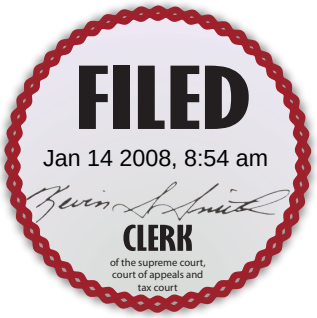


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| MICHAEL L. MASSING, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 20A04-0705-CR-461 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Gene R. Duffin, Senior Judge
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-9701-CF-4

**January 14, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Michael L. Massing appeals the trial court's order denying his petition for leave to file a belated notice of appeal pursuant to Indiana Post-Conviction Rule 2.

We vacate the trial court's order and reverse.

## FACTS AND PROCEDURAL HISTORY

Massing was charged by Information with one count of murder,[1] a felony. Massing pled guilty to the single count of murder. On May 1, 1997, Massing was sentenced to the cap on the plea agreement, fifty-five years. The trial court did not advice Massing of his right to appeal his sentence. In February of 2007, Massing claims that he was informed by Stephen Weiland, the inmate law clerk, that he could attempt to obtain permission to file a late direct appeal in order to challenge his sentence. On June 20, 2007, Massing *pro se* filed his verified petition for leave to file a belated notice of appeal. The trial court denied Massing's petition without holding an evidentiary hearing or appointing counsel to represent him. Massing now appeals.

## DISCUSSION AND DECISION

Massing pled guilty pursuant to a written plea agreement that set a sentencing cap at fifty-five years. Ordinarily a person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). However, a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e., where the sentence is not fixed by the plea agreement. *Id.* When a plea

[1] *See* IC 35-42-1-1.

agreement sets forth a sentencing cap, or sentencing range, the court must exercise some discretion in determining the sentence it will impose. *Childress v. State*, 848 N.E.2d 1073, 1078 (Ind. 2006). Therefore, Massing was entitled to challenge the merits of the trial court's sentencing discretion. At sentencing, trial court did not advise Massing of that right. The fact that the trial court at a guilty plea hearing does not advise the defendant in a open plea situation of their right to appeal the sentence to be imposed does not warrant an exception to the rule that sentencing claims must be raised on direct appeal. *Collins*, 817 N.E.2d at 233. This is because Indiana Post-Conviction Rule 2 will generally be available in this situation. *Id.*

Indiana Post-Conviction Rule 2 permits an individual, convicted after a trial or guilty plea, who fails to file a timely notice of appeal, to petition for permission to file a belated notice of appeal. *Kling v. State*, 837 N.E.2d 502, 503 (Ind. 2005). The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. *Witt v. State*, 867 N.E.2d 1279, 1281 (Ind. 2007).

A trial court's ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination. *Moshenek v. State*, 868 N.E.2d 419, 423-24 (Ind. 2007). However, where the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only basis for its decision is the paper record attached to the petition. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Because the trial court did not hold a hearing on Massing's petition in this

case, this Court reviews the denial of Massing's petition *de novo*. *Cruite v. State*, 853 N.E.2d 487, 489 (Ind. Ct. App. 2006) *trans. denied*.

Massing alleges that his failure to file a timely notice of appeal was through no fault of his own because at his plea hearing the trial court did not advise him of his right to appeal his sentence. The fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal. *Moshenek*, 868 N.E.2d at 424.

Here, the State concedes the trial court erred when it failed to inform Massing of his appellate rights, but it contends that Massing has failed to show that he was diligent in requesting permission to file a belated appeal. The problem is that Massing did not have the opportunity to make such a showing. Several factors are relevant to this inquiry. Among them are the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which the delays are attributable to other parties. *Moshenek*, 868 N.E.2d at 424. In this case, the overall passage of time was substantial; more than ten years passed between the date Massing was sentenced and the date he petitioned for leave to file a belated notice of appeal. However, Massing was not silent during that time. He filed a praecipe for guilty plea transcript, which was granted. He additionally filed a second motion to obtain a copy of the guilty plea hearing transcript and his motion to compel discovery, which were denied. He later filed a petition for modification of sentence, which was also denied. Finally, Massing filed a motion to correct error, which was denied just weeks before he filed the petition at issue here.

Massing contends that he was not fully aware of the facts or his legal remedies during the guilty plea hearing or in the years that followed. He claims that he first became aware of his ability to petition for leave to file a belated appeal in February of 2007, and made plans to do so as soon as the modification proceedings were concluded. The court denied his motion to correct error on June 7, 2007, and Massing filed a verified petition for leave to file a belated appeal on June 20, 2007.

We are unable to conclude that Massing was at fault for the delay or that he was not diligent in requesting to file a belated notice of appeal. Therefore, we remand with instructions to hold a hearing on Massing's petition for leave to file a belated notice of appeal.

Vacated and remanded.

ROBB, J., concurs.

BARNES, J., dissents with separate opinion.

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
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| MICHAEL L. MASSING, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 20A04-0705-CR-461 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

**BARNES, Judge, dissenting**

I respectfully dissent. I believe there is no need to remand this case for a hearing and that we ought to affirm the trial court's denial of Massing's petition for leave to file a belated appeal.

First, I see nothing in Post-Conviction Rule 2(1) that would require the trial court to hold a hearing in this or any other case involving a petition for leave to file a belated appeal. The rule states, "Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1." Ind. Post-Conviction Rule 2(1). This says to me that <u>if</u> the trial court chooses to hold a hearing, it must be conducted using the same procedures as for a post-conviction relief petition. It does not say the trial court must or ought to hold a hearing. Rather, as our supreme court and this court have acknowledged, whether a trial court holds a hearing

affects the appellate standard of review. Specifically, if a trial court holds a hearing, our standard of review is abuse of discretion, and if it does not hold a hearing, our standard of review is de novo, without deference to the trial court's ruling. See Moshenek v. State, 868 N.E.2d 419, 423-24 (Ind. 2007) (citing Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005), trans. denied).

Even applying the de novo standard of review to this case, I cannot say the trial court erred in denying Massing permission to file a belated appeal. Massing bore the burden of establishing two things by a preponderance of the evidence before he was entitled to file a belated appeal: (1) he was without fault in the delay of filing; and (2) he was diligent in pursuing permission to file a belated appeal. Id. at 422-23. I acknowledge that the failure of the trial court to properly advise Massing of his rights regarding an appeal of his sentence may establish that some delay in filing was not his fault.

I simply think that Massing did not meet the diligence prong of the test. Factors that courts have considered regarding diligence include the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays might be attributable to parties other than the defendant. Id. at 424. We also have considered, in cases where a defendant pled guilty and later attempts to challenge his or her sentence, whether the defendant made previous efforts to challenge the sentence through other, collateral means, such as through post-conviction relief, and the timing of such efforts in relation to our supreme court's decision in Collins v. State, 817 N.E.2d 230 (Ind. 2004), which clarified that such challenges must be made only through a direct

appeal, belated or otherwise, and not through post-conviction relief. See Perry v. State, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), trans. denied.

Here, Massing filed nothing challenging his sentence—no direct appeal, post-conviction relief petition, sentence modification petition, or petition for leave to file a belated appeal—until nine-and-a-half years after he was sentenced. In December 1997, several months after he was sentenced, Massing did obtain a copy of the guilty plea hearing transcript with the stated intention of filing a post-conviction relief petition. Thus, Massing clearly was aware of post-conviction relief procedures. However, he never filed any such petition. In January 2000, Massing requested a second copy of the guilty plea hearing transcript, alleging he had lost the first copy. After the trial court denied this request in February 2000, Massing took no further action in his case until December 2006, when he filed a petition for modification of his sentence. After this petition was denied in June 2007, Massing finally filed his belated appeal petition.

I am sensitive to the right of a defendant to fully and fairly litigate a legitimate claim. However, Post-Conviction Rule 2 and case precedent require a defendant to be diligent in pursuing such claims. Finality is an important part of the criminal justice system, especially "[w]hen the overall time stretches into decades . . . ." Moshenek, 868 N.E.2d at 424. I do not believe Massing makes the necessary showing of diligence here. Instead, I believe he fiddled while his appeal rights burned in over nine years of relative inaction. I vote to affirm the trial court's denial of permission for Massing to initiate a belated appeal.